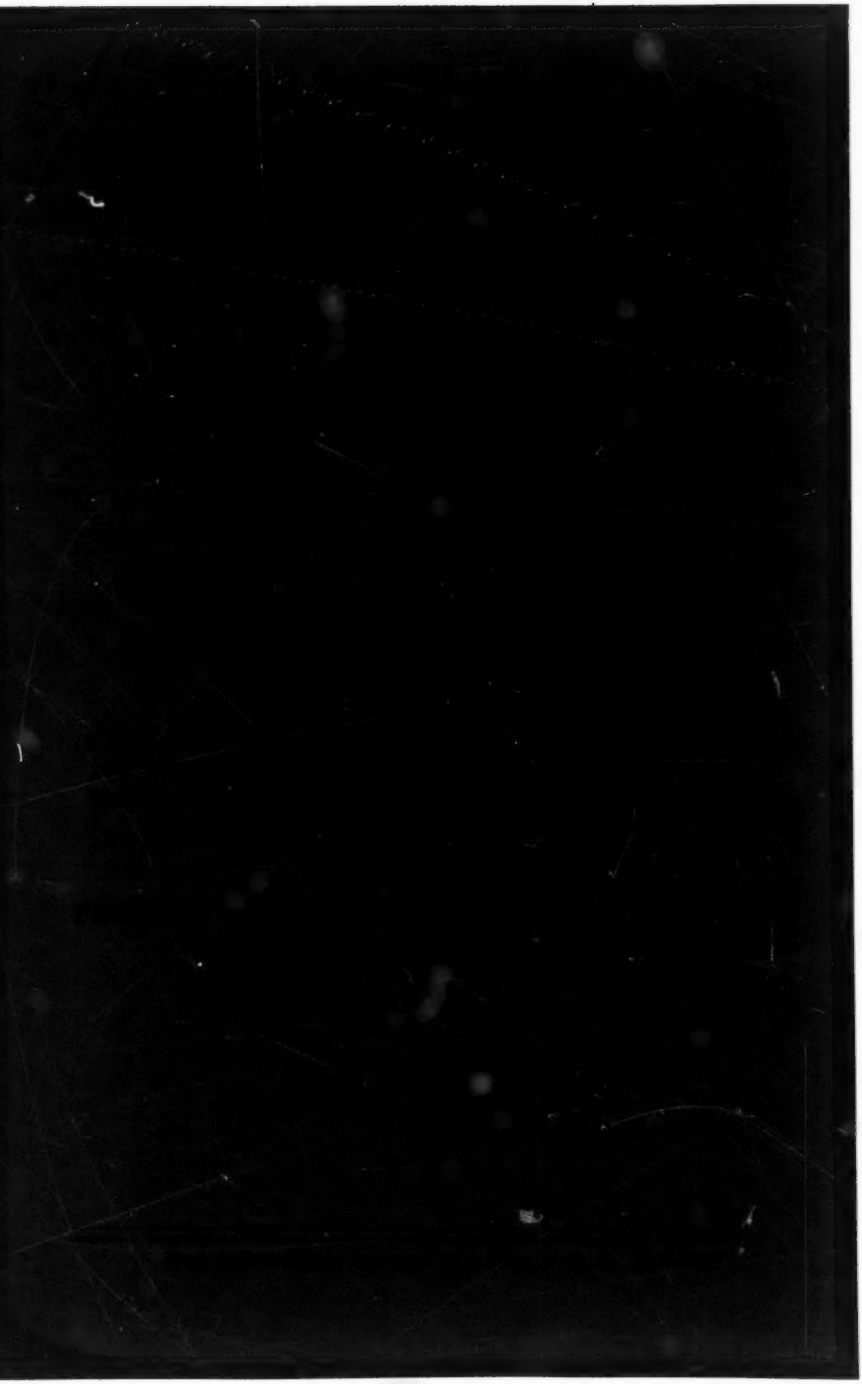

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 253.

ADA F. McDONNELL, PLAINTIFF IN ERROR,

vs.

LLEWELLYN JORDAN, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

PETITION OF DEFENDANT IN ERROR FOR A RE-HEARING.

To the Honorable the Justices of the Supreme Court of the United States:

The defendant in error, Llewellyn Jordan, respectfully presents this, his petition for a re-hearing and submits the following reasons why his prayer should be granted:

Par. 1. The Court in its opinion say that, "If Llewellyn Jordan had applied to be formally admitted as a co-propon-

ent, it must be assumed that he would have been permitted to become such of record, but he made no such application." It is respectfully submitted that this was in effect what the defendant in error endeavored to do. As soon as he was advised by the original proponent of the existence of the pending contest, as appears by the record on page 16, he endeavored to have himself made a party by the formal amendment of the original petition to probate said will. At the time that this application was made by the original proponent to have the defendant in error made a party to the contest proceeding all had been done that could have been done to prove the will in an *ex parte* proceeding. The will itself had been formally surrendered by the original proponent into the legal custody of the court and its due execution proven by the only surviving witness without conflict of testimony. This proved the will in common form. But it is not conceded that any written petition to probate said will was necessary. For indeed no such written petition is deemed necessary under the Alabama practice as will more fully appear in case of Small *vs.* McCalley, 51 Ala., 527. The court assumes from its examination of the record that your petitioner, the defendant in error, was permitting the will to be propounded, a contest to be initiated and carried on, a trial had and after a mistrial, with a full knowledge of all that was transpiring seek at that stage to intervene in the said contest proceeding and remove the case to the Federal court. It is respectfully submitted, as indeed it is admitted by counsel for the plaintiff in error, see page 11 of plaintiff in error's brief, that this petitioner, the defendant in error, so far as the record shows had no knowledge whatsoever of this contest over said will until the matter was brought to his notice through the application of the original proponent to amend his written petition then on file in the Probate Court. As soon as this knowledge came to your petitioner he endeavored, first, by the means of an amendment to the petition of the original proponent to make himself a party

in order that he might defend his interests against the contest which had been instituted and was then pending in said Probate Court. After three months of deliberation the Probate Judge for reasons, which do not appear, decided that the amendment to the petition proposed by the original proponent could not be made. This action of the Probate Judge was, in effect, a denial of the right which your petitioner had to make himself a party, under the Alabama statutes and decisions of the Supreme Court of that State, for the purpose of protecting and defending his rights, *he not then being represented by any one.* His presence was necessary and he was an indispensable party to a complete determination of the issues involved in said contest. "It is no part of the duty of executors to defend a will against a contest. That is left to the devisees or those interested in sustaining the will." This view was advanced by Mr. Chief Justice Waite, with whom Mr. Justice Harlan concurred in the case of McArthur *vs.* Scott, 113 U. S., p. 407. This position is sound, and it must be conceded that there is no escape from the conclusiveness of this doctrine. Therefore, Walter E. Jordan, a merely nominal party, a coexecutor simply, with no beneficial interest in the will, could not by his acts bind this petitioner without his knowledge and without his consent. It was the absolute right and bounden duty of this petitioner to become a party to the said contest proceeding as soon as he acquired notice thereof. There was no privity either in law, in blood, or in estate between the original proponent and your petitioner. Can it be said, therefore, that in the absence of any such privity of relationship, that a person of his own motion can offer a will for probate under the circumstances disclosed by this record, and without the knowledge and consent of your petitioner, employ counsel, and conduct proceedings which will bind your said petitioner as fully and completely as if he had been a willing party to such proceedings? I do not conceive that it was the intention of

this Honorable Court to so hold, but in effect its decision has that significance, and can have none other. Should this judgment of the court be carried into effect it would result in depriving this petitioner of any opportunity whatsoever of asserting his rights either in the Probate Court, he having been denied admission upon application and intervention to be made a party for the purpose of defending his rights, or in the Federal Court.

Par. 2. The Court in its opinion states that the presumptions are against your petitioner and that he was represented by his coexecutor to such an extent that when he took his place by intervention he was subject to all such disabilities as to the right of removal as then existed. This doctrine it would appear is in conflict with the decision of this court as expressed in the case of Powers *vs.* Chesapeake and Ohio R'y, 169 U. S., 101. Your petitioner states positively and unequivocally that his presence as a party to this contest proceeding was involuntary; that his presence was essential to a complete and final determination of the controversy; that he was a necessary party. That he did not come into the case as a substituted party or in the place of any rights which had been formerly asserted by the original proponent and that if the decision of the court in the case just cited is controlling, the rule is that a removal is never too late when the application is made as soon as the proceeding assumes the shape of a removable cause in the court in which it originated.

Par. 3. It is respectfuly submitted that an examination of this record shows a plain and unmistakable attempt on the part of the Probate Judge to defeat the rights of your petitioner, either in the said Probate Court or in the United States Circuit Court. When the answer and intervening petition of your petitioner was presented to the Probate Court it was accompanied by an affidavit of S. S. Pleasants, the only surviving witness to the said will, said affidavit having been taken before the said Probate Judge and duly

marked filed by him in his own person as of August 4, 1897. This affidavit was an exhibit to the intervening petition of your said petitioner duly filed in said Probate Court on August 4, 1897. With these facts before the Probate Judge can it be said that this intervening petition and answer with this accompanying affidavit were filed without his knowledge and without his consent? When this case was removed to the Federal Court upon August 12, 1897, there was no order appearing upon the minutes of the said Probate Court, nor so far as known, to counsel for the defendant in error, upon the intervening petition itself, striking said petition from the files of the Probate Court. It is plain from this record that this order so attached was an afterthought with the Probate Judge, and undoubtedly made for the purpose of preparing a transcript which would be favorable to the plaintiff in error. It is stated positively that no knowledge was brought to the attention of counsel for your petitioner as to the existence of any such order striking his petition and answer from the files of the Probate Court, until September 4, 1897, one day after the counsel for the plaintiff in error had filed a transcript of the proceedings in the Probate Court in the Federal Court and which was made as an exhibit to a motion to strike the petition of removal of your petitioner from the files of said Federal Court. Believing that a fraud had been practiced upon your petitioner and the court a writ of certiorari was sued out from the Federal Court and duly served upon the judge of the Probate Court to the end that he might certify the record of the said Probate Court as it existed upon the date of the removal of this cause of action from the State court. In the cases referred to by the court in its opinion as concluding the right to a removal after a trial had of the case in the State court, it is unquestionably true that in all of such cases the parties thus concluded were parties of record either in proper person or by authorized legal representatives in the proceedings in the State court. This was notably true in the case of Fisk *vs.*

Henarie, 142 U. S., 459, upon which the court bases its judgment that the application for removal in this case was made too late. As before stated your petitioner was not represented in the said case by any one in the Probate Court, nor was he permitted to become a party in his proper person for the purpose of defending his rights, and it would seem that the reasons adduced in the cases cited would fail in this case because the circumstances in this case are in no sense analogous to those shown in the cases cited. (See in this connection pages 29, 30, and 31 of brief of defendant in error on motion to dismiss or affirm.)

Par. 4. The attention of the court is respectfully called to the following language found upon page 11 of the brief of the plaintiff in error: "There is no law in Alabama, authorizing Llewellyn Jordan to be made a party to the probate proceeding. The question was presented to a Court of competent jurisdiction, and its adverse holding remains unreversed, and notwithstanding the fact that he was eliminated from the case, by this judgment of the Probate Court, he filed his petition in the Circuit Court of the United States, to remove a proceeding from the State court, *to which he was not a party.*" Again, on page 16 of said brief of plaintiff in error it is contended in the fourth place as follows: "At the time of the filing of the petition in this cause for removal to the Circuit Court of the United States, there was no controversy in the Probate Court of Madison County, Alabama, between a citizen of the State of Alabama, and a citizen of another State, which was necessary to give a Federal court jurisdiction." Admitting these contentions of the plaintiff in error to be true may it not be inquired what will be the nature of the proceeding upon the event of the remanding of this cause by the Federal court to the Probate Court by which your said petitioner may be able, if permitted so to do, to again reassert and defend any rights which he may have as sole legatee and devisee, and as named executor under the said will. Is it not fair to as-

sume that the Probate Judge having done all in his power to defeat the assertion of the rights of your petitioner in the said Probate Court and to defeat the jurisdiction of the Federal Court in the premises that he will continue so to do, and thereby deprive your said petitioner of having any day in court, which would in effect amount to an absolute denial of justice. The record of this case now on file in the United States Circuit Court of Appeals at New Orleans, upon a writ of error, sued out by the plaintiff in error, shows in the testimony of the leading counsel for the plaintiff in error the boldest and most striking evidences of a colossal fraud practiced upon the Federal Court which consisted in the effort to pack the jury-box with the friends, political associates and partisans of the husband of the said contestant, and of the leading counsel for the said plaintiff in error who has been and is now a candidate for election to the Congress of the United States. This testimony of the leading counsel shows that of two hundred and more names placed in the jury-box by the Democratic jury commissioner, that 192 of this number were the friends, political associates or partisans in this contest proceeding of the husband of the said contestant, or political supporters of the leading counsel for the contestant in his previous races for Congress and all resident in Madison Co., Alabama. Of twelve counties composing the Northern Division of the Northern District of Alabama only seven thereof contained names of persons which were placed in the jury-box by the said Democratic jury commissioner. It was found without exception that all of these names in these six counties represented in every case the political supporters of the leading counsel in his several races for Congress. These facts were presented to the Honorable John Bruce, United States District Judge at Montgomery, Alabama, and upon a due consideration thereof, he deemed it wise and prudent and in the interests of justice to remove the Democratic jury commissioner, to empty the jury-box of all names ille-

gally or improperly placed therein, to notify the jurors who had been thus illegally and irregularly summoned not to appear at court until further advised, and further the appointment of a new Democratic Jury Commissioner charged with the duty of filling in a legal and proper manner and in accordance with existing statutes the jury-box from which venires were to be drawn, to try this and other cases then pending in court. Not content with this attempt to defeat the ends of justice while this case was on trial in the Federal court, the original list of the jurors whose names had been improperly and illegally placed in the jury-box—and prepared by one George B. Vandeventer, *at that time, and now*, the clerk of the Probate Court of Madison County, Alabama, and as appears by the testimony in the Federal Court, was the amanuensis of the husband of the contestant during the trial of the issues of this case in the State court,—was stolen under the eyes of the court and in the presence of the jury while deliberating upon this case. This paper which was the most incriminating piece of evidence upon which to found an indictment and base a conviction of the jury-stockers was last seen at the trial table of the contestant at which were seated the leading counsel for the contestant, Hon. William Richardson, Associate Counsel Lawrence Cooper, who argued this case in this Honorable Court, the contestant, the husband of the contestant, and his brother. Every effort was made through the judicial machinery of the Federal court to discover the whereabouts of this missing paper, but up to the present time it has not been found, and doubtless has been destroyed. Must your petitioner, therefore, in view of all the circumstances surrounding this case, either as shown in this record now before this court, or in the record now on file in the United States Circuit Court of Appeals at New Orleans, be forced back into the Probate Court, where he was denied any standing whatsoever with these adverse political influences arrayed against him, and

with the clerk of that Probate Court as one of the parties concerned in this effort to pack the jury-box in the Federal Court? I cannot believe that this Honorable Court would permit, what in this case would amount to an absolute denial of justice by having this case remanded to the said Probate Court.

IN SUBSTANTIATION OF THESE STATEMENTS I HEREWITH SUBMIT THE ONLY PRINTED COPY NOW IN THE POSSESSION OF YOUR PETITIONER OF THE RECORD OF THE CASE NOW PENDING IN THE CIRCUIT COURT OF APPEALS AT NEW ORLEANS.

For these reasons, and in the interest of justice, the purity of the judiciary, and fair dealing, I most humbly petition this Honorable Court that the mandate in this case may be stayed and a rehearing granted, to the end that the case may be restored to the docket and a re-argument ordered before a full bench as to the questions involved, and if this application be denied, that the case be then considered as if resubmitted to the full bench on the briefs heretofore filed.

LLEWELLYN JORDAN.

The undersigned members of the bar of this Honorable Court, humbly conceive that it is proper that the writ of error herein should be reheard by this Honorable Court, if this Court should see fit so to order, and they, therefore, respectfully certify accordingly.

HEBER J. MAY,
R. W. WALKER,
Counsel for Petitioner.